# Pak Ki Yau & Anor v Kumpulan Promista Sdn Bhd

HIGH COURT (IPOH) — CIVIL APPEAL NO 11-18 OF 1998
CLEMENT SKINNER JC
15 MAY 1999

***Civil Procedure*** *— Locus standi — Assignment of rights in sale and purchase agreement — Whether assignor entitled to sue in his own name — Whether absolute assigment under s 4(3) Civil Law Act 1956*

***Contract*** *— Assignment — Absolute assignment — Purchaser assigned rights and interests in sale and purchase agreement to bank — Whether purchaser can sue developer in his own name — Whether assignment absolute under s 4(3) Civil Law Act 1956*

The respondent — a developer — had on 19 October 1989 entered into a sale and purchase agreement ('the agreement') with the appellants in respect of a semi detached industrial lot in Pengkalan Light Industrial Park, Ipoh ('the property'). The agreement provides that the respondent would complete and deliver vacant possession of the property to the appellants within 24 months from 19 October 1989. The respondent delivered vacant possession only on 29 October 1992. The appellants proceeded to claim damages against the respondent. The respondent argued that as the appellants had effectively assigned all their rights, title and interest in the sale agreement to the bank, the appellants had no locus standi to bring this action, and therefore should have either joined the bank as co-plaintiff or co-defendant. The learned magistrate upheld the preliminary objection and struck out the appellants' claim and hence this appeal. Counsel for the appellants submitted that unless the assignment executed by the appellants in favour of the bank was an absolute assignment (and not by way of charge only) within the meaning of s 4(3) of the Civil Law Act 1956 ('the Act'), it cannot have the effect in law that the respondent contends it has.

**Held**, allowing the appeal with costs:

(1) The loan cum assignment is essentially entered into by way of security for a loan that is repayable on demand. The fact that the loan cum assignment is entered into by way of security for a loan would not by itself prevent it from being absolute, but when that fact is considered together with other facts and clauses in the instrument, it does show that the assignment is intended by way of charge only (see p 227 C–G).

(2) Despite the fact that the word 'absolutely' is used in the assignment clause (cl 4), there are other clauses which show that the full and entire benefit of the agreement and all rights, title and interests of the appellants therein have not been transferred to the respondent (see p 227G).

(3) The effect of cl 14 of the agreement is to render the assignment a conditional and not an absolute one. The repayment of the loan as well as the execution and registration of the charge is an uncertain event, the result of which makes the assignment conditional (see p 228G–H)

**Per curiam:**

The case of *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268 — which counsel for the respondent submitted has dealt with similar clauses as provided in the agreement, and therefore should be followed in order to decide that there was an absolute assignment in the present case — is distinguishable as the assignment clause in the former is not in pari materia with the assignment clause in this case and the deed of assignment there formed a separate and distinct document from the loan agreement (see pp 226I–227A).

**[Bahasa Malaysia summary**

Responden — seorang pemaju — telah pada 19 Oktober 1989 memasuki perjanjian jual beli ('perjanjian tersebut') dengan perayu-perayu berkenaan dengan lot industri sebandung di Taman Perindustrian Ringan Pengkalan Light, Ipoh ('harta tanah tersebut'). Perjanjian memperuntukkan bahawa responden akan menyiapkan dan memberikan milikan kosong harta tanah tersebut kepada perayu dalam 24 bulan dari 19 Oktober 1989. Responden memberikan milikan kosong hanya pada 29 Oktober 1992. Perayu-perayu telah mula menuntut terhadap responden. Responden telah berhujah bahawa oleh kerana perayu-perayu telah menyerahhak semua hak-hak, milikan dan juga kepentingan di dalam perjanjian jualan kepada bank, perayu tidak mempunyai locus standi untuk membawa tindakan ini, dan oleh itu sepatutnya memasukkan bank sebagai plaintif bersama atau defendan bersama. Majistret yang arif telah mengesahkan bantahan awal dan telah mengketepikan tuntutan perayu dan rayuan dibuat. Peguam utnuk perayu-perayu telah berhujah bahawa kecuali penyerahhakan yang dilaksanakan oleh perayu-perayu kepada bank adalah penyerahakan mutlak (dan bukan secara gadaian sahaja) di dalam maksud s 4(3) Akta Undang-Undang Sivil 1956 ('Akta tersebut'), ia tidak boleh mempunyai kesan dari segi undang-undang yang responden tegaskan ada.

**Diputuskan**, membenarkan rayuan dengan kos:

(1) Pinjaman serta penyerahakan secara asas dimasuki dengan cara jaminan untuk pinjaman yang kena dibayar jika dituntut. Fakta bahawa perjanjian serta penyerahakan dimasuki dengan cara jaminan untuk pinjaman tidak akan dengan sendiri menghalang-

nya daripada menjadi mutlak, tetapi apabila fakta tersebut dipertimbangkan bersama dengan fakta-fakta dan fasal-fasal lain di dalam instrumen, ia menunjukkan bahawa penyerahkan diniatkan sebagai jaminan sahaja (lihat ms 227C–G). A

(2) Walaupun hakikat bahawa perkataan 'mutlak' digunakan di dalam fasal penyerahhakan (fasal 4), terdapat fasal-fasal lain yang menunjukkan bahawa faedah penuh dan menyeluruh perjanjian tersebut dan segala hak-hak, milikan dan kepentingan perayu-perayu telah pun dipindahkan kepada responden (lihat ms 227G). B

(3) Kesan fasal 14 di dalam perjanjian adalah untuk menjadikan suatu penyerahakan bersyarat dan bukan satu yang mutlak. Pembayaran balik pinjaman dan juga pelaksanaan dan pendaftaran gadaian tersebut adalah suatu kejadian yang tidak pasti, mengakibatkan penyerahhakan tersebut adalah bersyarat (lihat ms 226I–227A). C

**Per curiam**: D

Kes *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268 — di mana peguam responden telah berhujah melibatkan fasal yang sama seperti yang terdapat di dalam perjanjian tersebut, dan oleh itu sepatutnya diikuti untuk memutuskan bahawa terdapat penyerahakan mutlak di dalam kes ini — boleh dibezakan oleh kerana fasal penyerahhakan di dalam kes tersebut adalah bukan in pari materia dengan fasal penyerahhakan di dalam kes ini dan perjanjian penyerahhakan di situ dibentuk secara berasingan dan berbeza daripada perjanjian pinjaman tersebut (lihat ms 226I–227A).] E

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**Notes**

For cases on assignment generally, see 3 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1567–1598.

For cases on locus standi generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3083–3118.

G

**Cases referred to**

*Bank of Commerce (M) Bhd v Mahajaya Property Sdn Bhd* [1997] 3 MLJ 620 (refd)

*Christina Angelina a/p William Bastian @ Anor v Newacres Sdn Bhd* [1996] 5 MLJ 549 (refd) H

*Chung Khiaw Bank Ltd v Hipparion (M) Sdn Bhd* [1988] 2 MLJ 62 (refd)

*Durham Brothers v Robertson* [1898] 1 QB 765 (refd)

*Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd* [1989] 2 MLJ 149 (refd)

*Loh Hoon Loi & Ors v Viewpoint Properties (Sabah) Sdn Bhd* [1995] 4 MLJ 804 (refd) I

*Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268 (distd)

**Legislation referred to**

Civil Law Act 1956 s 4(3)

*James Devadason* (*Maxwell Kenion Cowdy & Jones*) for the appellants.
*Abdul Shukor Ahmad* (*Shukor Baljit & Partners*) for the respondent.

*Cur Adv Vult*

**Clement Skinner JC**: This is an appeal by the plaintiffs ('the appellants') against the decision of the learned magistrate, who on 18 March 1998, on a preliminary objection being taken by the defendant ('the respondent'), struck out the plaintiffs' claim on the grounds that the appellants had no locus standi to initiate these proceedings against the respondents. The facts leading to the striking out are these.

The respondent is a developer who on 19 October 1989 entered into a sale and purchase agreement ('the sale agreement') with the appellants wherein the appellants were sold one unit of semi detached industrial lot in Pengkalan Light Industrial Park, Ipoh ('the said property') for RM95,000. It was a term of the sale agreement that the respondent would complete and deliver vacant possession of the said property to the appellants within 24 months of 19 October 1989. In the events that transpired, the respondent delivered vacant possession only on 29 October 1992. The appellants accordingly on 26 October 1993 commenced these proceedings to claim damages against the respondent.

When this case came on for trial on 4 March 1998, the respondent took a preliminary objection based on the following facts. To enable them to finance the purchase of the said property, the appellants obtained a loan from Malayan Banking Bhd ('the bank') of RM40,000 ('the said loan'). In obtaining the said loan, the appellants were required to enter into what is termed a 'Loan Agreement cum Deed of Assignment' with the bank ('the loan cum assignment'). In its recitals, the loan cum assignment makes reference to the fact that the appellants have entered into the sale agreement, that a separate document of title has yet to be issued to the said property and that the bank has agreed to grant the appellants the said loan on condition that the plaintiffs assign to the bank all their rights, title and interest to the said property and under the sale agreement. Clause 4 of the loan cum assignment then reads:

> Assignment
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> For the consideration (sic) the borrower hereby absolutely assigns to the bank the said property and the full and entire benefit of the sale agreement together with all rights title and interests of the borrower therein provided always that notwithstanding the assignment herein before contained or any other provision of this agreement the borrower shall and hereby undertake to continue to observe, perform and be bound by all whatever conditions covenants and stipulations therein on the part of the borrower expressed and contained in the sale agreement.

Before the learned magistrate, the respondent submitted that as the appellants had effectively assigned all their rights, title and interest in the sale agreement to the bank, the appellants were incompetent to bring this

action on their own. It is the respondent's stand that the appellants should have either joined the bank as co-plaintiff and if they refused, the bank could be joined as co-defendant. Not having done either, the appellants had no locus standi to bring this action.

The submission of the respondent found favour with the learned magistrate who upheld the preliminary objection and struck out the appellants' claim. Hence this appeal.

Before me, Mr James Devadason, learned counsel for the appellants submitted that unless the assignment executed by the appellants in favour of the bank was an absolute assignment (and not by way of charge only) within the meaning of s 4(3) Civil Law Act 1956 ('the Act'), it cannot have the effect in law that the respondent contends it has. It is learned counsel's submission that the assignment is not absolute for two reasons:

(a) the word 'absolute' appearing in cl 4 of the loan cum assignment should not lead the court to conclude that the assignment is in fact absolute. Whether or not it is so, must be determined not just by looking at cl 4 but the whole language of the document. When this is done, counsel submits that it will be seen that the assignment, although expressed to be absolute, is in reality given by way of charge only; and

(b) it is a conditional and not an absolute assignment. Clause 14 of the loan cum assignment stipulates that once the loan has been fully repaid or a charge over the said property is registered in favour of the bank, whichever first happens, the assignment comes to an end. Since repayment of the loan or the creation of the charge is an uncertain event, the assignment is conditional and not absolute and therefore not within the provisions of s 4(3) of the Act.

Counsel then referred to the cases of *Loh Hoon Loi & Ors v Viewpoint Properties (Sabah) Sdn Bhd* [1995] 4 MLJ 804 and *Bank of Commerce (M) Bhd v Mahajaya Property Sdn Bhd* [1997] 3 MLJ 620 in support of his submissions.

Encik Abdul Shukor Ahmad, learned counsel for the respondent, submits however that cl 4 is an absolute assignment and has the effect of divesting the appellants of all their rights, title and interest under the sale agreement to the bank.

To show the absolute nature of the assignment, counsel referred to several clauses of the loan cum assignment. He referred to cl 4 itself, then to cl 26 which imposes certain obligations and duties on the appellants in relation to the said property, such as to keep the same in proper repair and condition as well as prohibiting a transfer, charge or letting of the same without the prior consent of the bank. Counsel also referred to cl 28, which obliges the appellants to pay all outgoings and to keep the bank fully indemnified against all claims in respect of the said property. Counsel then referred to cl 27, wherein the bank is appointed the attorney of the appellants and empowered to do several things, including to enforce all

rights and remedies under the sale agreement. It is counsel's submission that when all these clauses are read, they show that the rights of the bank overrides in its entirety those of the appellants under the sale agreement with the result that one cannot but arrive at a conclusion that the assignment is an absolute one.

In support of its submissions, the respondents rely on the case of *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268 and the cases of *Chung Khiaw Bank Ltd v Hipparion (M) Sdn Bhd* [1988] 2 MLJ 62 and *Christina Angelina a/p William Bastian @ Anor v Newacres Sdn Bhd* [1996] 5 MLJ 549.

Counsel for the respondent further points out that the deed of assignment in the *Nouvau Mont Dor* case contained several clauses, the wordings of which are also to be found in the loan cum assignment in our present case and identified them as: the assignment clause (cl 4); the clause to the effect that the assignor shall at all times save harmless and keep the bank indemnified (cl 28); the clause that the assignment shall remain in force until revoked by either the execution and registration of a first legal charge in favour of the bank or the repayment of the loan (cl 14). It is counsel's submission that since similar clauses were found to indicate the absolute nature of the assignment in the *Nouvau Mont Dor* case, this court should follow the decision there.

The only issue in this appeal that requires a decision is whether cl 4 of the loan cum assignment constitutes an absolute assignment within the meaning of s 4(3) of the Act. However, before considering that question, this would be a convenient place to make reference to some of the authorities cited in submissions and to the observations made in them on the law relating to absolute assignments.

First, the case of *Nouvau Mont Dor* where the Federal Court in the course of considering s 4(3) of the Act gave advice as to what it is that a court will look at and should confine itself to when construing a deed of assignment to determine whether it is an absolute one or only by way of charge. This is what Seah FJ said at p 270 of that case:

> It is plain that in every case of this kind, all the terms of the instrument must be considered; and whatever may be the phraseology adopted in some particular part of it, if, on consideration of the whole instrument, it is clear that the intention was to give a charge only, then the action must be in the name of the assignor. While, on the other hand, if it is clear from the instrument as a whole that the intention was to pass all the rights of the assignor in the debt or chose in action to the assignee, then the case will come within s 25 and the action must be brought in the name of the assignee.

In a later part of the same judgment, Seah FJ dealt with a submission by counsel for the appellant to the effect that since the appellant had signed a loan agreement as well as an assignment, the assignment should not read in isolation but should be read in conjunction with the loan agreement. To that submission, Seah FJ held at p 270:

> In our judgment and it seems clear from the authorities abovementioned, whether or not an assignment is an absolute one (not purporting to be by way of charge only) within the meaning of s 4(3) of the Civil Law Act 1956 is to be gathered only from the four corners of the instrument itself.

Next, reference should be had to *Chitty on Contracts* (24 Ed) Vol 1 at para 1155 where the test for determining whether an assignment is absolute or not is stated thus:

> The test seems to be, has the assignor unconditionally transferred to the assignee for the time being the sole right to the debt in question as *against the debtor*. If so, the assignment will be absolute, but if the debtor cannot tell whether to pay the assignor or the assignee without examining the state of accounts between them, it will be held to be by way of charge only. Much may depend on the language of the particular instrument; in construing it, the court will look at the whole language. The words italicised above are the crucial importance, for it is no concern of the debtor whether the assignor and assignee have some private arrangement for the disposal of the debt after it has been paid by the debtor.

Finally, reference must be made to the case of *Durham Brothers v Robertson* [1898] 1 QB 765, where Chitty LJ explained the nature of a conditional assignment and why it would not qualify as an absolute assignment under s 25(b) of the Judicature Act 1873 which in England introduced the statutory assignment and which provision has now been replaced by s 136 of the Law of Property Act 1925. The Malaysian equivalent of the section is s 4(3) of the Act. In dealing with an assignment which was expressed in terms not absolute but until the happening of an event, namely the repayment of an advance and interest, Chitty LJ said at pp 772–773:

> The assignment before us complies with all the terms of the Enactment save one, which is essential: it is not an absolute but a conditional assignment. The commonest and most familiar instance of a conditional assurance is an assurance 'until JS shall return from Rome'. The repayment of the money advanced is an uncertain event, and makes the assignment conditional. Where the Act applies, it does not leave the original debtor in uncertainty as to the person to whom the legal right is transferred, it does not involve him in any question as to the state of the accounts between the mortgagor and the mortgagee. The legal right is transferred, and is vested in the assignee. There is no machinery provided by the Act for the reverter of the legal right to the assignor dependent on the performance of a condition; the only method within the provisions of the Act for revesting in the assignor the legal right is by a retransfer to the assignor followed by a notice in writing to the debtor, as in the case of the first transfer of the right. The question is not one of mere technicality or of form: it is one of substance, relating to the protection of the original debtor and placing him in an assured position.

Having addressed myself on the law and the approach a court should take in deciding the issue at hand, I will deal with the submission of learned counsel for the respondent that because certain clauses found in our loan cum assignment were considered in *Nouvau Mont Dor*, this court should follow that decision. I wish to say that whilst I gratefully accept the principles stated in that case and have no hesitation in applying them to

reach a decision here, the facts of that case are distinguishable on at least two important aspects, namely, the assignment clause is not in pari materia with the assignment clause in our case and the deed of assignment there formed a separate and distinct document from the loan agreement. In our case, the assignment forms but one clause in a loan document. I therefore regret I am unable to accede to the submission of counsel. A proper reading of *Nouvau Mont Dor* shows that in every case of this kind, whether the assignment is absolute or by way of charge only is a question to be decided by considering all the relevant terms and looking at the whole language in the instrument creating the assignment.

Having considered all the terms and the language of the loan cum assignment as a whole, this is what I find. Firstly, it is essentially entered into by way of security for a loan that is repayable on demand; until such demand, the appellants are to repay the sum together with interest thereon over a period of 10 years by 120 monthly instalments. As the loan was to enable the appellants to purchase the said property, to better secure itself whilst awaiting the issue of a document of title thereto when a charge over the same can be registered, the bank has by cl 4 taken an assignment of the said property. That the loan cum assignment is entered into by way of security is demonstrated by the fact that it is only meant to remain in force until the loan is repaid or a title deed is issued for the said property and a charge registered in favour of the bank. Until that happens, the loan cum assignment is meant to afford the bank a measure of security through various clauses in the instrument designed to empower the bank to deal with the said property in the event of default by the appellants (see cl 10). Likewise, the language adopted in various clauses that make reference to 'all moneys secured hereby' or 'money intended to be hereby secured' or 'reference to the security hereby created' or 'this security' demonstrate that the loan cum assignment is entered into by way of security. These phrases are used throughout the instrument and are to be found in cll 1(4), cll 2, 8, 9, 11, 12, 14, 21, 22, 23, 26(11), 26(3) and 26(6). In my judgment, the fact that the loan cum assignment is entered into by way of security for a loan would not by itself prevent it from being absolute, but when that fact is considered together with other facts and clauses in the instrument as identified below, the combined effect is that it does show that the assignment is intended by way of charge only.

Secondly, despite the fact that the word 'absolutely' is used in the assignment clause (cl 4), there are other clauses which show that the full and entire benefit of the sale agreement and all rights, title and interests of the appellants therein have not been transferred to the respondent. Clause 19 in particular permits or recognizes that the appellants may execute or create a further or subsequent assignment, charge, mortgage or encumbrance over the said property or any part thereof, and to do so would not constitute an event of default; the only sanction such an event invites is that the bank is entitled to open a separate account and any money repaid by the appellants is paid into such new account and will not be treated as a repayment of the loan. In my view, a clause such as the above which allows the appellants to

exercise rights over the said property as if he is still the owner thereof, must surely by strong indication mean that the parties did not intend the assignment to be absolute. In addition to the above, cll 15, 26 and 33 all recognize that the appellants are entitled to have possession of and enjoy the said property except that the appellants are obliged to insure, maintain and upkeep the same. If the assignment was intended to be absolute so as to transfer all rights, title and interest in the said property, as contended for by the respondent, then the appellants' occupation and use of the said property would only be possible with the permission and licence of the respondent. Yet, there are no words in the loan cum assignment that indicates that the position of the appellants are that of a licensee. I would here refer to the case of *Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd* [1989] 2 MLJ 149 where it was held, inter alia, that the defendant's rights to possession subsequent to the execution of the assignment depended entirely upon the contractual licence granted to him by the plaintiff.

I have not overlooked the fact that there are clauses such as cl 10 which sets out what the bank may do with the said property in the event of a default, as for example taking steps to sell or assign the property to others, or cl 26 which imposes restrictions and obligations on the appellants as to what they can or cannot do with the said property whilst the loan cum assignment is still in force, as for example maintaining the said property and not letting out the same or altering the same, or cl 38 which requires the appellants to pay all outgoings and dues in respect of the said property and to keep the bank fully idemnified in respect thereof, or cl 29 that entitles the bank to retain custody of all documents relating to the said property, but I do not regard these clauses as evidence of the absolute nature of the assignment; rather, they show an intention that the assignment is by way of charge because these clauses are directed more at protecting the security taken rather than transferring right, title and interest therein. They are also designed to preserve and maintain the value of the property and to give 'bite' to the security taken in the event enforcement becomes necessary. I also view the power of attorney clause (cl 27) in the same light, namely to enhance the security taken by being able to undertake the acts stated in the said clause without having to involve the appellants.

Thirdly, the effect of cl 14 is to render the assignment a conditional and not an absolute one. Clause 14 provides that the loan cum assignment shall remain in force until and unless the transfer and charge mentioned in cl 13 is duly registered or the said loan is repaid in full, whichever first happens whereupon it comes to end. However, the repayment of the loan as well as the execution and registration of the charge is an uncertain event the result of which makes the assignment conditional. This would involve the respondent in the state of accounts between the appellants and the bank to ascertain in whom the legal right to the said property is transferred. Once this happens, it cannot be said that the assignment is absolute within the meaning of s 4(3) of the Act.

For the reasons given above, I conclude by saying that in my judgment, the assignment in this case is not an absolute one. The appellants were not

A deprived of competency to bring this action in their own name. I accordingly allow this appeal with costs and set aside the order of the learned magistrate.

*Appeal allowed with costs.*

B Reported by Benjamin Yong

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